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HOO LIN COLN

v.

WONG WENG WOH & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
T SELVENTHIRANATHAN J
MOHD HISHAMUDIN YUNUS J
[CIVIL APPEAL NO: R-17B-28-2005]

C

24 MARCH 2006

LEGAL PROFESSION: *Professional discipline - Misconduct - Disciplinary proceeding - Striking off the Roll - Whether finding of misconduct perverse and against weight of evidence - Whether Disciplinary*
D *Committee misdirected itself - Whether Disciplinary Board falling into same error - Legal Profession Act 1976, ss. 94, 102(2)(b),103B, 103C, 103E(2)*

LEGAL PROFESSION: *Professional discipline - Disciplinary*
E *proceeding - Allegation of misconduct - Procedure as to hearing - Whether to be begun by complainant - Standard of proof - Whether proof beyond reasonable doubt - Hearing begun with evidence of party complained against - Whether flawed - Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, r. 23*

F ***STATUTORY INTERPRETATION:*** *Construction of statutes - Rule 23 Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 - Whether merely conferring right of cross-examination to parties - Whether also prescribing procedure of proceeding before Disciplinary Committee*

G

The appellant, a legal assistant with a law firm ('the firm'), was alleged to have solicited a sum of RM35,000 from a client of the firm ('SKB') without the firm's knowledge and kept the money for himself without doing the work requested for. Following a
H complaint lodged by a partner of the firm (the first respondent), the matter of the appellant's conduct was referred to the Disciplinary Committee ('DC') appointed by the Advocates and Solicitors Disciplinary Board ('DB') under s. 102(2)(b) Legal Profession Act 1976 ('LPA'). The first respondent complainant did
I not attend the hearing before the DC. And so it was that, at the said hearing, the appellant was directed to take the stand first, before the DC proceeded to hear the witnesses from SKB ('Mr.

Khue' and 'Miss Liaw'), and the other partners of the firm ('Dato Manjit' and 'Mr. Lam'). Be that as it may, the appellant testified that he had collected the money at the instruction of Dato Manjit and had passed the same to him. This evidence of the appellant was substantiated by the two witnesses from SKB, with Mr. Khue affirming a statutory declaration that he only paid the money after getting the green light from Dato Manjit. The DC, however, was not convinced by the evidence, and so, opted to believe Dato Manjit when he said that he knew nothing about the payment made to the appellant. The DC, in the circumstances, found the appellant guilty of misconduct within the meaning of s. 94 of the LPA (acting dishonestly and fraudulently in the discharge of his professional duties), and on that ground recommended that he be struck off the Roll. The DB agreed and so ordered that the appellant be struck off the Roll. Dissatisfied, the appellant appealed.

Held (allowing the appeal):

(1) The DC had misdirected itself when it failed to give any reason as to why Mr Khue and Miss Liaw were not to be believed. The DC had failed to consider that their evidence: (i) was evidence of non-interested parties who had corroborated the evidence of the appellant; (ii) had created serious doubt on the versions as presented by the first respondent through Dato Manjit and Mr Lam; (iii) was consistent with the innocence of the appellant; and (iv) would totally destroy the first respondent's complaint. (para 23)

(2) Looking at the cold print of the evidence, there is no reason why this court should not believe the evidence of Mr. Khue or Miss Liaw, they being independent and uninterested witnesses and had nothing to gain from the outcome of the matter. And so, considering that there was no rebuttal evidence from Dato Manjit on Miss Liaw's testimony that he had allowed her to release the money to the appellant, the release of the three cheques totalling RM35,000 to the appellant must have received the approval of Dato Manjit. (paras 4, p 964 h & 17)

(3) Striking off the Roll is a serious punishment and to do so would demand proof beyond reasonable doubt of the complaint. In the present case, in the face of the

overwhelming evidence of Mr. Khue and Miss Liaw, the DC should have found as a fact that the complainant had not discharged the standard of proof required of him. (paras 6 & 11, p 973 g-h)

(4) The DC had misdirected itself by way of non-direction on the standard and burden of proof when it heard and investigated the complaint under s. 103C of the LPA. By directing the appellant to begin the case, and not calling the complainant and offering him for cross-examination, the DC had committed a grave procedural error. Clearly, the appellant was prejudiced because he lost the inherent right of rebuttal. Further, by reversing the procedure, the DC was virtually asking the appellant to prove his innocence, thereby putting an undue burden on the appellant. (paras 13 & 20)

(4a) The DC, by failing to make the complainant available for cross-examination, had also contravened r. 23 of the Legal Profession (Disciplinary Proceedings) (Investigation Tribunal and Disciplinary Committee) Rules 1994 ('LPR'). Rule 23 of the LPR does not merely confer the right of cross-examination to the parties, but also prescribes the procedure of the proceedings for the DC to adopt. The rule refers to the cross-examination of the complainant first, and therefore, the evidence of the complainant must precede the evidence and cross examination of the advocate and solicitor concerned. (para 20, p 979)

(5) The decision of the DC had gone against the weight of evidence and was thus flawed. The DC had also failed to invoke an adverse inference against the first respondent for not offering himself as a witness to be cross-examined by the appellant. In the event, the court would allow the appeal with costs to the appellant. (para 30)

Case(s) referred to:

Abse & Ors v. Smith & Anor [1986] QB 536 ***(refd)***
Arthur JS Hall & Co v. Simons, Barratt v. Ansell & Ors, Harris v. Scholfield Roberts & Hill & Anor [2002] 1 AC 615 ***(refd)***
Au Kong Weng v. Bar Committee, Pahang [1980] 2 MLJ 89 ***(refd)***
Balasingham v. PP [1959] 25 MLJ 193 ***(refd)***
Beevis v. Dawson & Ors [1957] 1 QB 195 ***(refd)***
Bhandari v. Advocates Committee [1956] 3 All ER 742 ***(refd)***
British Railways Board v. Herrington [1972] AC 877 ***(refd)***
Campbell v. Hamlet [2005] 3 All ER 1116 ***(refd)***
Carter v. Palmer [1839] 1 Dr & Wal 722 ***(refd)***

Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 ***(refd)***
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 FC ***(refd)***
Geveran Trading Co Ltd v. Skjevesland [2002] EWCA Civ 1567 ***(refd)***
Jerald Allen Gomez v. Shencourt Sdn Bhd; Majlis Peguam (Intervenor) [2006] 1 CLJ 88 HC ***(refd)***
Kanawagi Seperumaniam v. Dato' Abdul Hamid Mohamad [2004] 5 MLJ 495 ***(refd)***
Keith Sellar v. Lee Kwang, Tennakoon v. Lee Kwang [1980] 2 MLJ 191 ***(refd)***
Ketua Pengarah Kastam v. Ho Kwan Seng [1977] 2 MLJ 152 ***(refd)***
Lim Boon San v. PP [1968] 2 MLJ 45 ***(refd)***
Liow Siow Long v. PP [1970] 1 MLJ 40 ***(refd)***
Meek v. Fleming [1961] 2 QB 366 ***(refd)***
Nadarajan Verayan v. Hong Tuan Teck (No 1) [2005] 6 AMR 228 ***(refd)***
Poole v. Whitcombe [1862] 12 CBNS 770 ***(refd)***
Praed v. Graham [1889] 24 QBD 53 ***(refd)***
Prince Jefri Bolkiah v. KPMG (a firm) [1999] 2 AC 222 ***(refd)***
R v. Treacy [1944] 2 All ER 229 ***(refd)***
R v. Walker [1668] Tremaine's Pleas of the Crown 261, 2 Hawk PC II c 22s 30 ***(refd)***
Reekie v. M'Kinven [1921] SC 733 ***(refd)***
Rondel v. Worsley [1969] 1 AC 191 ***(refd)***
Saif Ali v. Sydney Mitchell & Co & Ors, P (third party) [1980] AC 198 ***(refd)***
Tombling v. Universal Bulb Co Ltd [1951] WN 247 ***(refd)***
Vernon v. Bosley (No 2) [1999] QB 18 ***(refd)***
Williamson v. Rover Cycle Co [1901] 2 IR 619 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)
Legal Profession Act 1976, ss. 101(4)(a)(ii), 102(2)(b), 103C(1)(a), (b), (c), 103E(2)
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994, r. 23

Other source(s) referred to:

Bryan A Garner, *Black's Laaw Dictionary*, 7th edn, p 1258

For the appellant - Gurbachan Singh (Harcharan Singh & Amritpal Singh with him); M/s KC Wan & Co
For the 1st respondent - Jagjit Singh; M/s Jagjit Singh & Co
For the 2nd respondent - N Chandran; M/s Albar & Partners

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Introduction

[1] Two episodes must be mentioned here. The first pertained to the four cheques involving the appellant and other parties where the disciplinary committee has cleared the appellant since there was no sufficient evidence of misconduct or dishonesty on his part (see p. 230 of the appeal record) and the appellant had returned the monies to the law firm of Messrs Manjit Singh Sachdev, Mohammad Radzi & Partners (hereinafter referred to as "MSSMR"). The second concerned the alleged solicitation of the sum of RM35,000 from Syarikat Kiew Brothers (hereinafter referred to as "SKB") by the appellant without the knowledge of the law firm of MSSMR and without opening a file in the law firm of MSSMR and this eventually came up by way of an appeal to this court under s. 103E(2) of the Legal Profession Act 1976 (hereinafter referred to as the "LPA"). The disciplinary committee ("DC") found that the appellant had solicited from SKB, a client of MSSMR, the sum of RM35,000 without having done the work that was requested for by SKB, so it was alleged, and the appellant, so it was alleged, had kept the money for himself and the DC recommended that the appellant be struck off the Roll. The disciplinary board ("DB") considered the report put up by the DC and likewise ordered that the appellant be struck off the Roll (see p. 236 of the appeal record). No lawyer in town would like to be struck off the Roll.

The Pertinent Facts

[2] The appellant joined MSSMR as a legal assistant on 8 May 1998 to build up the intellectual law practice for MSSMR and the appellant left MSSMR on 15 July 2000 to set up his own law firm by the name of Messrs Lin Coln & Lina Hoo. When the appellant was with MSSMR, Dato Manjit Singh Sachdev (hereinafter referred to as the "said Dato") – the senior partner of MSSMR, introduced the appellant to Mr. Khue Jau Horng of SKB and the said Dato had instructed the appellant to handle SKB's trade mark application with the trademark office in Kuala Lumpur. The appellant had collected a total sum of RM35,000 for MSSMR in the course of handling SKB's trade mark application. SKB purportedly wrote a letter dated 21 October 2000 to MSSMR as seen at p. 20 to p. 21 of the appeal record

complaining about the sum of RM35,000 that was paid to the appellant. Evidence wise, it was shown that this very letter dated 21 October 2000 from SKB was actually written by the said Dato. Then, by another letter dated 24 October 2000 as seen at p. 22 to p. 23 of the appeal record, SKB purportedly wrote a letter to the director of the complaints secretariat of the Bar Council lodging a complaint (hereinafter referred to as the "original complaint") against the appellant. This was followed by a letter dated 26 October 2000 from SKB to the Bar Council as seen at p. 44 to p. 45 of the appeal record wherein SKB "unconditionally withdrew" its complaint against the appellant. The Bar Council then wrote a letter dated 10 November 2000 to SKB confirming that the complaint lodged against the appellant was closed and for completeness that very letter was worded as follows (see p. 46 of the appeal record):

Complaint Against Hoo Lin Coln

We refer to the above matter and to your letter of 26 October 2000, the contents of which have been duly noted.

As you have withdrawn the complaint for the reasons stated in your said letter, the Bar Council will deem the matter closed.

[3] That would have ended the matter there and then. But, being dissatisfied, the first respondent by the name of Mr. Wong Weng Woh, a senior partner of MSSMR lodged a fresh complaint dated 17 November 2000 to the DB as seen at p. 15 to p. 16 of the appeal record. Mr. Wong Weng Woh (the first respondent) also affirmed a statutory declaration dated 21 December 2000 narrating the alleged misdeeds of the appellant as seen at p. 17 to p. 19 of the appeal record. I should be forgiven if I were to reproduce verbatim that statutory declaration:

1. I am an Advocate and Solicitor of the High Court of Malaya in Kuala Lumpur practising under a partnership under the name of M/s Manjit Singh Sachdev, Mohammad Radzi & Partners.

2. The facts deposed herein is taken from all the documents available in my firm and is within my personal knowledge and I belief (sic) (believe) the same to be true.

3. I swear this Statutory Declaration to support the formal complaint *via* my firm's letter of 17th November 2000 to the Bar Council Advocate and Solicitors' Disciplinary Board against Mr. Hoo Lin Coln, an Advocate and Solicitor of the

High Court of Malaya practising in Kuala Lumpur. Enclosed herewith is a copy of my firm's letter of 17th November 2000 marked as exhibit "A1" herein.

4. I state that my firm, M/s Manjit Singh Sachdev, Mohammad Radzi & Partners have on 21st October 2000 received a letter from one Sykt Kiew Brothers of No 30, Jalan Han (sic) (Hang) Lekir Kuala Lumpur. Enclosed herewith and marked as exhibit "A2" herein is a copy of the letter of 21st October 2000 for easy reference.

5. The said Sykt Kiew Brothers made some serious allegations against my firm, M/s Manjit Singh Sachdev, Mohammad Radzi & Partners.

6. My firm were attending to a Sale and Purchase Agreement for some of the partners and relatives of Sykt Kiew Brothers and at the same time my partner Dato Manjit Singh Sachdev had introduced Mr. Hoo Lin Coln to Sykt Kiew Brothers. Mr. Hoo Lin Coln worked as a legal assistant for my firm from 8th May 1998 until 15th July 2000.

7. While Mr. Hoo was with my firm, his scope of work was mainly to do (with) trade mark and other intellectual property matters.

8. Before the introduction to Sykt Kiew Brothers, while Mr. Hoo Lin Coln was with my firm on or about July 1999 my firm had received an envelope containing four (4) cheques. The said envelope was addressed to my firm but inside the envelope my firm received one Hong Kong Bank Malaysia Bhd (HKBMB) cheque No 319681 dated 19th July 1999 drawn upon the amount of RM1,600/- and drawn in favour of my firm and one HKBMB cheque no 319682 dated 19th July 1999 drawn upon the amount of RM500.00 in favour of Mr. Hoo Lin Coln. The other two Hong Leong Bank cheques dated 7th August 1999 and 15th August 1999 drawn upon the amount of RM1,000/- each and drawn in favour of Mr. Hoo Lin Coln.

9. Mr. Hoo Lin Coln took the cheques in his favour and banked into his account.

10. My partner Dato Manjit Singh had questioned Mr. Hoo Lin Coln on these cheques and the said Mr. Hoo Lin Coln had said that he can write the cheques back to my firm which he did.

11. My firm now have no choice but to lodge a formal complaint after receiving the serious allegations from Sykt Kiew Brothers.

12. My other partners Mr. Lam Sam Kit and Dato Manjit Singh went to see Sykt Kiew Brothers and were then informed of the full facts that is, Mr. Hoo Lin Coln during the time of his employment with my firm had himself without consent from or knowledge of any of the partners of the firm without opening any file in my firm induced and took RM35,000/- from Sykt Kiew Brothers for obtaining a registration of a trade mark.

13. My partners and I were shocked, surprised and embarrassed and upon meeting the partners of Sykt Kiew Brothers my partners told them that our firm were fully unaware of whatever Mr. Hoo Lin Coln has done and upon request my partners assisted them to put up a complaint. A copy of the letter of complaint dated 24th October 2000 is enclosed herewith and marked as exhibit "A3" herein together with a copy of the rejected Trade Mark and the three (3) payment vouchers all marked herein as exhibit "A4" and "A5(a), (b) and (c)" respectively which clearly show that Mr. Hoo Lin Coln had taken cash cheques from Sykt Kiew Brothers on the pretext of being able to obtain the Certificate of Registration for them within three (3) months.

14. I need to lodge a formal complaint against Mr. Hoo Lin Coln as the element of misconduct is evident which has greatly embarrassed my partners and I, and we are apprehensive of the fact that there may be others which my partners and I may not be aware of.

15. My partner Dato Manjit Singh were made aware verbally that Mr. Hoo Lin Coln has been in contact with Sykt Kiew Brothers and are settling or have settled the said amount to Sykt Kiew Brothers.

16. My partners and I are of the view that it is conduct unbecoming of any advocates and solicitors to have such a situation.

17. My partners and I would need to register a formal complaint with the Bar Council for the two (2) incidents above and also for fear of other complaints which my partners and I were not aware of at this stage.

18. I hope (that) the Bar Council can assist me in this matter.

[4] The chronology of events continue as follows:

4.1 A letter from the appellant to the DB dated 20 March 2001 as seen at p. 42 to p. 43 of the appeal record where the appellant enclosed a copy of the letter from SKB that said that the complaint against the appellant was withdrawn.

4.2 A letter dated 21 October 2003 from the investigating tribunal ("IT") addressed to the appellant as seen at p. 50 to p. 51 wherein the IT informed the appellant that the IT has been appointed by the DB to investigate the complaint and submit the report to the DB and the IT also gave notice to the appellant to give his written explanation to the IT.

4.3 By letter dated 28 October 2003 as seen at p. 53 to p. 55 of the appeal record, the appellant gave his explanation to the IT pursuant to s. 101(4)(a)(ii) of the LPA and I must reproduce the salient parts of his explanation. At the third paragraph of his explanation towards the last portion, the appellant explained (see p. 53 to p. 54 of the appeal record):

> I was informed by the Trade Mark Registry that the registry was willing to consider the application if good and cogent reasons can be given as to the delay in replying to the said CD 70 letter. I had then informed Dato Manjit Singh about my discoveries and he then instructed me to proceed to handle the matter and to collect RM35,000.00 from Kiew Brothers to be paid in cash. I told Dato Manjit Singh that the sum is very high for such trade mark work and he had told me to follow his instructions as Mr. Khue Jau Horng has the money to pay. I had then accordingly collected the said payments from Mr. Khue Jau Horng.

And one may ask whether the appellant handed the sum of RM35,000 to the said Dato? That would be the crucial question to ask and I will revert to this at a later stage. Be that as it may, the appellant also explained that the Bar Council had closed their file in regard to the complaint against him. Of pertinence would be the contents of para. 6 of the appellant's explanation and it was worded in this manner (see p. 54 of the appeal record):

> I would like to inform the Investigating Tribunal hereby that Dato Manjit Singh had been very bitter towards me and also to my sister, Hoo Lina, who is also an advocate and solicitor, for leaving his firm and had on several occasions insulted both myself and my sister for leaving his firm. I firmly believe that Dato Manjit

Singh has had certain ulterior motives in instigating the complaint against me. I have at all times during my employment at the firm, been directly under the instructions of Dato Manjit Singh and I could see no relevance howsoever why Mr. Wong Weng Who (sic) (Woh) is the complainant and not Dato Manjit Singh himself.

4.4 Mr. Wong Weng Woh being the first respondent responded by letter dated 21 November 2003 addressed to the IT as seen at p. 57 to p. 59 of the appeal record. At p. 58 of the appeal record, Mr. Wong Weng Woh wrote:

> In respect of the 3 payments amounting to RM35,000.00 from Kiew Brothers, we do not have any knowledge of the same whatsoever until our firm received Kiew Brother's complaint. The RM35,000.00 were never paid to our firm by the Respondent. No file was ever opened by the Respondent.
>
> It is our firm's policy that before the lawyer in charge should do any work, a file must be opened and disbursements are to be obtained.
>
> We therefore categorically deny the whole paragraph 3 of the said letter and reiterate that our Dato Manjit Singh never at any time instructed the Respondent to collect 3 payments amounting to RM35,000.00 from Kiew Brothers which was paid to and in the name of the Respondent personally. The same were never made known by Respondent to the firm or any partners of the firm and never paid to our firm, neither was there ever a file opened under our firm to do the Trade Mark matter for Kiew Brothers.
>
> We further categorically deny that our Dato Manjit Singh was ever informed of any discoveries or searches. We did not know that the Respondent had himself personally proceeded to do the matter. There was never any instruction given to collect the RM35,000.00 at all by any partner in the firm.
>
> We write to state categorically no file for the brief of trade mark was ever opened in our firm. The letters from Kiew Brothers and the conduct of them writing to us and lodging a police report which is a very serious matter speaks for themselves.

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> We only came to know about the matter when Kiew Brothers complained that he had given RM35,000.00 to the Respondent who came personally to collect them.
>
> The facts are evident and speak for themselves on the conduct of the Respondent.

B

4.5 The IT prepared its report dated 12 April 2004 as seen at p. 60 to p. 65 of the appeal record, and this was what the IT concluded and recommended (see p. 65 of the appeal record):

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> The Tribunal deliberated on the evidence before them and made the following conclusions:
>
> 1. As Mr. Khue cannot be produced as a witness to enable the Tribunal to determine who is telling the truth, the
D Tribunal found that the Complainant has failed to substantiate the first part of the Complaint.
>
> 2. Based on the letter dated 26th February 2004 from the Complainant to the Tribunal (exhibit 14(u)) and the letter dated 27th February 2004 from the Tribunal to the
E Complainant (exhibit 14(v)) and the explanations given by Beh Kwang and Mr. Lee Kam Wah (exhibits 14(r) and 14(s) respectively), the Tribunal found that there is no basis for the second part of the Complaint.

F

> **Recommendation**
>
> The Investigating Tribunal recommends that no action be taken against the Respondent based on the findings of fact stated above.

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In short, the IT recommended that no action ought to be taken against the appellant.

4.6 Notwithstanding that the IT recommended that no action be taken against the appellant, yet the DB proceeded to appoint a DC on 20 October 2004 (see p. 73 of the report of the
H DC at item 5 wherein the DC proceeded to hear the evidence of the parties). The DB was certainly entitled to appoint a DC to conduct a formal investigation by calling witnesses notwithstanding that the IT was of the opposite view. This is sanctioned by s. 102(2)(b) of the LPA which enacts as
I follows:

If the Investigating Tribunal in its report recommends:

(b) that a formal investigation by a Disciplinary Committee is not necessary, the Disciplinary Board may, if it disagrees with the recommendation, appoint a Disciplinary Committee.

This court was shown a letter dated 13 September 2004 which shows that the DB had decided to appoint the DC notwithstanding the negative recommendation by the IT. That letter was worded as follows:

Re: Complaint No : DC/00/0592

Complainant : Mr. Wong Weng Woh of Messrs Manjit Singh Sachdev Mohammad Radzi & Partners

Respondent : Mr. Hoo Lin Coln of Messrs Lin Coln & Co

1. The Disciplinary Board has at its meeting held on 21/8/2004 considered the complaint and Report of the Investigating Tribunal and decided to constitute a Disciplinary Committee for a formal investigation pursuant to s.102(2) and s.103B of the Legal Profession Act, 1976.

2. You will be notified of the date, time and venue of the hearing in due course.

This letter should have been incorporated in the appeal record for easy reference and in future it is hoped that it will be done.

4.7 The first day of the hearing before the DC was on 17 December 2004 when the appellant (RW1) was the first witness to give evidence and this can be seen at p. 75 to p. 77 of the appeal record. The appellant was asked to give his evidence first and he simply complied. Why was this so? Was this a procedural foul up? Was this a reversal of the procedure? I shall revert to these nagging questions at the later part of this judgment. In his evidence, the appellant said that in relation to the registration of the trademark from SKB he had gone to see Mr. Khue Jau Horng and had enquired with the trade mark office to ascertain whether SKB's trade mark could be registered. He testified that the trade mark office was willing to consider registering SKB's trademark if

cogent reasons were given for the delay. He then reported all these to the said Dato and the latter directed him to charge Mr. Khue Jau Horng RM35,000. The appellant was surprised at this exorbitant sum but the said Dato' retorted that it did not matter because Mr. Khue Jau Horng "is able to pay". Surprisingly, Mr. Khue Jau Horng too agreed to pay RM35,000. The notes of evidence at p. 76 of the appeal record showed the following answers of the appellant and they are certainly very germane to the occasion:

8. I was asked by Dato Manjit to collect a cash cheque from Mr. Khue.

9. On March 29, 2000, I collected a cash cheque for RM10,000. I signed for it to acknowledge receipt.

10. I cashed the cheque – Hong Leong Bank was just next door to Kiew Brothers. I gave the money to Dato Manjit personally on March 29, 2000.

11. No receipt was given to me.

12. I have no idea why Dato Manjit asked me to give him cash.

13. Yes, this was the first time this happened.

14. After I got the first payment, I worked on the file. I got the letter of acceptance from the trade mark office within a month. There had been an objection from the trade mark office because of delay. I overcame the objection and got the trade mark office to accept the submission – the letter of acceptance was the CD 29 form. I gave the CD to Mr. Khue personally. He had to sign it personally.

15. I went on April 20, 2000 to collect the second cash cheque for RM15,000. I cashed it and gave the money to Dato' Manjit.

16. On April 24, 2000 I went again to collect the third cheque for RM10,000. Because he had done the work and it was an agreed fee.

17. I left the firm in mid-June 2000.

Now, thus far, the evidence of the appellant showed that he cashed the cheque for RM10,000 and he gave the money to the said Dato. Then the appellant collected the second cash cheque of RM15,000 and he cashed it and gave the money

to the said Dato. The appellant then collected the third cheque for RM10,000 because he had done the work and that was an agreed fee. The appellant testified further before the DC and this can be seen at p. 77 of the appeal record. This was what the appellant said in his testimony:

25. The normal fees charged: RM1,200 to apply; RM2,200 – 2,400 until registration. So RM35,000 was exceptionally high. This figure was set by Dato Manjit.

27. The complaint letter was sent by Syt Kiew Brothers to Manjti (sic) (Manjit) Singh's firm on October 21, 2000 and to the Bar Council on October 24, 2000. I do not know why on October 26, 2000, Syt Kiew Brothers withdrew the complaint. I was asked by Vincent Teoh of Syt Kiew Brothers why the matter took so long and I explained that I had done what I was to do – submitted the CD 29. They asked me to take over the matter. So thereafter we filed the TM1 – substitution of agent. That was October or November 2000. Cannot remember exactly when.

28. We are now handling the trade mark, just did the renewal.

4.8 The second day of the hearing before the DC was on 18 January 2005 and the appellant continued to take the stand as seen at p. 78 to p. 80 of the appeal record. Briefly, the appellant testified that no file was opened and that only a folder was opened; that he was instructed by the said Dato to collect RM35,000 in one lump sum, and that he cashed the cheques and gave the money to the said Dato. The appellant's testimony reads as follows (see p. 79 of the appeal record):

12. The practice in Manjit Singh – upon payment of fees, open the file. We will not do anything until paid.

14. In this case, only a folder was opened. I told Dato Manjit that in this case, this application was long overdue and I was not sure if we can succeed in this matter. So I left it to Dato Manjit whether to open the file.

15. [The Committee asked: who decides whether to open a file?] The lawyer handling the matter decides.

16. [The Committee asked: so in this case, why was it left to Dato Manjit to decide?] Because I needed to make sure that this matter can go through. We had asked for a sum of money which is very high for this work. I believe if we cannot do it, we should not charge so much.

17. [The Committee asked: does opening a file depend on this question?] I was instructed to collect the whole RM 35,000 in one lump sum, then only do the work. By then, I should have opened the file.

18. [The Committee asked: earlier on, you said you had done work over 2 months, so why do you say you had not opened the file?] Dato Manjit said do not open the file, and do not ask any questions.

19. Dato Manjit directed me to do the work and not open the file.

20. I am sure no file was opened.

Continuing at p. 80 of the appeal record, the appellant testified as follows and in the course of which he alluded to the statutory declaration of Mr. Khue Jau Horng:

23. It is not normal practice to open a folder and work on a folder.

24. This was the only case where folder was opened.

25. I do not know why this case was so special.

26. I cashed the cheques and gave the money to Dato Manjit.

27. I think he chose to make the complaint against me because I chose the (sic)(to) leave the firm. I had signed a 5-year contract. He was very angry when I resigned in mid-June. So he made a false report. Mr. Wong made the complaint. I do not know why he did not sue me for breach of contract.

28. In mid-November 2001, I filed in TM1 to register as official trade mark agent. The certificate was finally issued in 2002.

29. *[The Committee asked: when you said earlier today that you went to the registry, what were you looking for?]* I am not sure if I sent letters to the registry. I wanted to check.

30. I obtained a statutory declaration dated January 17, 2005 from Mr. Khue *[statutory declaration dated January 17, 2005 was produced and marked as exhibit "R-1"].*

31. Mr. Khue is the person whom Dato Manjit asked me to see.

It was quite apparent that the appellant in his testimony testified that the said Dato was angry when the appellant resigned from MSSMR in the middle of June and that was why the said Dato made a false report against the appellant.

4.9 The second day of the hearing before the DC on 18 January 2005 also saw the appellant's sister by the name of Miss Hoo Lina (RW2) giving her evidence in favour of the appellant. This was what she testified (see p. 80 of the appeal record):

1. I used to work at Manjit Singh Sachdev & Partners as a Legal Assistant, from November 1998 till July 2000.
2. Both my brother and I left at the same time.
3. I do not remember if there was anybody else in the firm who was doing IP work at that time.
4. Dato Manjit's reaction to the Respondent leaving the firm before his contract was over – he called us traitors. He threatened us. He blackmailed us.
5. His threat – he said "The business world is a small world, a very cruel world. We are bound to meet one day."
6. The Respondent is my brother.

Under cross-examination, she testified as follows (see p. 81 of the appeal record):

Cross-examination

1. *[Question : How did Dato Manjit blackmail you?]* – he took us out for dinner. He wanted to persuade us to stay back. Present were Respondent, Annie the office manager and her family (husband and son) and Dato Manjit's wife. He knew our parents. He said he wanted to break my mother's bones.
2. *[Question : How did he try to persuade you?]* – he said he had trained us so well, and now we wanted to leave.
3. *[Question : How many lawyers are there?]* – 6-7 excluding 5 partners – 12 in all.
4. I did not do IP, only Lin Coln.

[At this juncture, Respondent said he wanted to call Mr. Khue Jau Hong (sic) (Horng) as a witness, but he cannot attend today. The Committee agreed to hear Mr. Khue on January 26, 2005.].

A 4.10 The second day of the hearing before the DC on 18 January 2005 was quite eventful. It also saw the senior partner of MSSMR by the name of Mr. Lam Sam Kit (CW1) and the said Dato (CW2) testifying before the DC. In his testimony, Mr. Lam Sam Kit testified that he was shocked when he was B told by Mr. Khue Jau Horng that money had been paid to the appellant for the trade mark work and yet the work was not done. He testified that both he and the said Dato did not know about the matter and the law firm of MSSMR did not open a file on it. He testified that there was no record C of the receipt of any money from the client. This was what he testified (see p. 81 of the appeal record):

2. I went to see Mr. Khue with Dato Manjit on October 23, 2000.

D 3. At the meeting he told us that there was this registration of trade mark matter, money has been paid, work not done. Money paid to Mr. Hoo Lin Coln, supposed to be paid for registration of this trade mark. Problem of the trade mark had been on-going for some time.

E 4. We told him we were shocked to see the letter. We did not know about it.

5. He showed us the receipts – pages 22 - 24 of the Record.

F 6. We informed Mr. Khue that Mr. Hoo had left the firm in July.

7. I informed Mr. Khue that our firm never opened a file. Neither I nor Dato Manjit knew about this receipt at all.

G 8. He photocopied these and gave to me.

9. At this time we were in a predicament.

10. We asked Mr. Khue to get back to Mr. Hoo and clear up with him.

H 11. But there was still question of the money received. I had checked our office records – there was no file opened and no record of this sum of money being received from the client.

I Mr. Lam Sam Kit testified that Mr. Khue Jau Horng was most unhappy about the whole episode and was contemplating proceeding with the matter further. Mr. Lam

Sam Kit played a prominent role when he said that he took down notes, advised Mr. Khue Jau Horng about making a complaint and to lodge a police report. It seemed that Mr. Lam Sam Kit even assisted Mr. Khue Jau Horng to draft a letter to the Bar Council particularly the letter dated 24 October 2000 as alluded to earlier in this judgment and that very letter can be seen at p. 22 to p. 23 of the appeal record. Mr. Lam Sam Kit testified that he drafted in the English language and he communicated with Mr. Khue Jau Horng in the Cantonese dialect. From the tenor of Mr. Lam Sam Kit's testimony, the law firm of MSSMR is under the control of the said Dato. The testimony of Mr. Lam Sam Kit was as follows (see p. 82 of the appeal record):

12. Mr. Khue was very unhappy about this whole situation. He was really intending to take this matter further.

13. I was writing down notes, advised him to make a complaint and to make a police report.

14. I assisted him to draft a letter to the Bar Council – this appears at pages 8 – 9 of the Record of Complaint – the letter dated October 24, 2000.

15. I drafted in English, communicated with him in Cantonese. Our whole conversation was in Cantonese.

16. I did not read to Mr. Khue the contents of the letter because when he got it typed, I was not around.

17. We were with him from about 7pm – 10pm.

18. Dato Manjit knows Mr. Khue. I do not. I know the other brother. This was the first time I met Mr. Khue Jau Horng.

19. It was Dato Manjit who introduced Mr. Khue to Hoo Lin Coln. In our firm, unless Dato Manjit introduces and recommends, our LAs do not go and approach clients.

20. Our firm has not done any trade mark registration for Kiew Brothers previous to this.

Under cross-examination, Mr. Lam Sam Kit was asked to explain the comment in the letter dated 26 October 2000 as seen at p. 44 to p. 45 of the appeal record which stated that the letter dated 24 October 2000 (see p. 22 to p. 23 of the appeal record) was drafted by a senior lawyer who

was an Indian and Mr. Lam Sam Kit said that he cannot comment on it. Incidentally, the letter dated 26 October 2000 as seen at p. 44 of the appeal record, at the third paragraph, was worded like this:

> Firstly, our letter dated 24.10.00 was drafted by a senior lawyer who was an Indian. Mr. Khue Jau Horng on the other hand does not read or speak English at all. To make things worse, there was no one who advised Mr. Khue properly on what he was signing. We have to admit that there was some "miscommunication", to say the least, and the picture that was painted to the Bar Council was inaccurate.

As the evidence unfolded, it became clear that the letter of complaint dated 24 October 2000 as per p. 22 to p. 23 of the appeal record emanating from SKB was drafted by the said Dato and not by Mr. Lam Sam Kit. This piece of damning evidence also came directly from the testimony of Mr. Khue Jau Horng himself who testified in this way (see p. 87 of the appeal record):

> 10. The letter was prepared in my office. Prepared by Dato Manjit. That day was the birthday of Mr. Lam's wife. Mr. Lam came with Dato Manjit. I cannot remember whether my sister or Ms Liaw was the one who typed the letters. Not Mr. Lam. He just sat there.

The statutory declaration of Mr. Khue Jau Horng that was affirmed on 17 January 2005 as seen at p. 96 of the appeal record also confirmed that the "senior lawyer who was an Indian" referred to none other than the said Dato. The statutory declaration of Mr. Khue Jau Horng absolved the appellant of any criminal liability entirely. The sum of RM35,000 was agreed to be paid to the law firm of MSSMR for securing the trade mark of SKB and that was the amount agreed upon by the said Dato. That the said Dato had told Mr. Khue Jau Horng that he would send the appellant to collect RM35,000 and that Mr. Khue Jau Horng had paid that sum through three cheques dated 29 March 2000, 20 April 2000 and 24 April 2000 which were all acknowledged as received by the appellant. Thus, when the appellant said that he collected the sum of RM35,000 and gave it to the said Dato there was an element of truth in it. It was argued that this court should believe the appellant's version as opposed to that of the said Dato.

4.11 On the second day of the hearing before the DC on 18 January 2005, as I said, the said Dato also testified and he was cross-examined in due course. In examination-in-chief, the said Dato said that he received the letter dated 21 October 2000 from SKB as seen at p. 20 to p. 21 of the appeal record and he proceeded to see Mr. Khue Jau Horng who complained that the appellant had taken the money for the trademark application. According to the said Dato, he was taken aback because the law firm of MSSMR do not have a file on the matter and Mr. Khue Jau Horng also showed him the vouchers. The said Dato also proceeded to show the records of the trade mark cases handled by the law firm of MSSMR. The said Dato testified that the allegation that RM35,000 was collected on his instructions and given to him was not true. The said Dato also referred to the statutory declaration of Mr. Khue Jau Horng that was affirmed on 17 January 2005 as seen at p. 96 of the appeal record which said that the said Dato knew about the money and to this the said Dato said:

> If we take money, we will give a receipt. We will get client to sign an appointment of solicitors, open file. No file was opened.

The said Dato continued to testify (see p. 83 of the appeal record) and this was what he testified:

> 10. A lawyer cannot work on a folder without opening a file, unless with special authority from a partner. No record without a file.
>
> 11. The special circumstances may be – if a miscellaneous file is opened, eg for a will. This becomes a miscellaneous folder within a file. We have not done that for trade marks.
>
> 12. No, the Respondent did not seek my consent to open a folder. I was not even aware until the complaint letter came.

And it gave the impression that the said Dato was totally in the dark in regard to what had transpired between Mr. Khue Jau Horng and the appellant in regard to the opening of the folder concerning the registration of the trade mark of SKB. The said Dato also denied drafting the letter of complaint dated 24 October 2000 as per p. 22 to p. 23 of the appeal

record and he said that it was Mr. Lam Sam Kit who wrote the letter on the spot as Mr. Khue Jau Horng was talking. Again, the said Dato denied receiving any "money in regard to this file". In regard to his relationship with the appellant, this was what the said Dato said (see p. 84 of the appeal record):

15. The relationship with Mr. Hoo was OK.

16. No, there was no bad blood. But I was disappointed that they breached their contract. I did not want to pursue this, but the client wrote a complaint.

17. No, I did not at any time threaten or blackmail the Respondent and his sister. I had no reason to do that.

18. I cannot remember having dinner with them.

19. I met their parents after the Respondent joined. I even loaned them RM10,000 to buy a house in Puchong. The mother repaid it.

20. I did not say those words "The business world is a small world, a very cruel world. We are bound to meet one day."

The said Dato again denied the contents of the statutory declaration of Mr. Khue Jau Horng and the said Dato said that it was a complete turn around from SKB's letter dated 21 October 2000 as seen at p. 20 to p. 21 of the appeal record. In so far as the RM35,000 was concerned, general questions were asked of the said Dato and they were as follows:

14. *[Question : which other lawyer was doing IP?]* – I don't think there was any. Not at that time.

15. His departure left us without an IP lawyer. We then trained one of the litigation lawyers.

16. *[Question : who determined the fees?]* – Lin Coln looked at the market and put up a scale.

17. *[Question : Mr. Lam said that an LA does not go to see a client without the consent of a partner. Is that true?]* – if it is a client of the firm.

18. *[Question : Lin Coln said he paid you the money in 3 instalments.]* – Not true.

19. *[Question : is it correct that you introduced Mr. Khue to Lin Coln?]* – I was aware that Kiew Brothers had trade mark matters and I said that Lin Coln can deal with it.

4.12 The third day of the hearing before the DC was on 25 February 2005 and on that day Mr. Khue Jau Horng (RW3) gave evidence in the Cantonese dialect through the interpretation of an interpreter. He testified that around 29 March 2000 he gave a cheque for RM10,000 to the appellant. And that prior to handing that cheque to the appellant he had asked his secretary by the name of Miss Liaw Siew Fuai to telephone the said Dato for confirmation whether the cheque could be released to the appellant. Having received a positive confirmation from the said Dato through his secretary, he then released a cash cheque to the appellant. He said that he did not speak to the said Dato personally about this payment. He confirmed that the said Dato was aware of the two payments of RM10,000 and RM15,000 and that he gave these two cheques for the purpose of the registration of the trade mark. He testified that it was the said Dato who had requested for the sum of RM35,000. That on 21 October 2000 when the said Dato met him, he told the said Dato that he had paid RM35,000 and he requested for a receipt. The said Dato said that he was not aware of such payment. Mr. Khue Jau Horng then demanded for the refund of the money. The said Dato again said that he did not know and he requested Mr. Khue Jau Horng to sign two letters in order to claim the money. Those two letters were in the English language and Mr. Khue Jau Horng was unable to understand them. According to Mr. Khue Jau Horng, Wilson Teoh was appointed as a legal adviser to SKB for the purpose of resolving this matter and that his appointment was for a period of three months. The statutory declaration of Mr. Khue Jau Horng was shown and explained to him. For completeness, I shall now reproduce his statutory declaration in its original text (see p. 96 of the appeal record):

Surat Akuan

Saya, Khue Jau Horng (NRIC No: 630203-10-6101) yang cukup umur dan warganegara Malaysia dan beralamat di 9, Jalan Selar 4, Taman Bukit Ria, Cheras, 56100 Kuala Lumpur.

A

a) Saya telah difahamkan bahawa terdapat suatu komplain terhadap Hoo Lin Coln (NRIC No: 681021-08-6015) yang dibuat oleh firma Manjit Singh Sachdev, Mohd. Radzi & Partners.

B

b) Saya ingin menyatakan di sini bahawa saya telah diperkenalkan kepada Hoo Lin Coln oleh Dato Manjit Singh Sachdev untuk menolong saya dalam kes permohonan cap dagangan perniagaan saya.

C

c) Saya juga ingin menyatakan di sini bahawa saya telah bersetuju untuk membayar fee sebanyak RM35,000.00 kepada firma Manjit Singh Sachdev, Mohd Radzi & Partners untuk menolong saya untuk mengendalikan kes permohonan saya tersebut. Fee ini dipersetujui oleh Dato Manjit Singh Sachdev.

D

d) Saya selanjutnya menyatakan di sini bahawa Dato Manjit Singh Sachdev telah memberitahu saya bahawa dia akan menghantar Hoo Lin Coln untuk mengambil cek untuk RM35,000.00 tersebut.

E

e) Saya telah membayar fee tersebut melalui tiga (3) cek yang bertarikh 29.3.2000, 20.4.2000 dan 24.4.2000 yang diakui terima oleh Hoo Lin Coln bagi pihak firma tersebut.

F

f) Saya juga ingin mengesahkan di sini bahawa "Senior Lawyer who was an Indian" yang dimaksudkan oleh surat syarikat saya bertarikh 26.10.2000 adalah Dato Manjit Singh Sachdev. Saya langsung tidak tahu kandungan surat-surat bertarikh 21.10.2000 dan 24.10.2000 yang dikeluarkan oleh saya. Saya telah disuruh menandatangani surat-surat tersebut oleh Dato Manjit Singh Sachdev tanpa memberi penterjemahan. Saya diberitahu surat-surat tersebut hanyalah bertujuan untuk mengeluarkan sijil cap dagangan.

G

Saya membuat akuan ini adalah benar serta menurut kuasa yang diperuntukkan di bawah Akta Akuan Berkanun 1960.

H

Diperbuat dan dengan sebenar-benarnya
diakui oleh)
yang tersebut namanya di atas) t.t.
Di Kuala Lumpur pada 17 Jan 2005.) di hadapan saya

I

t.t.
Pesuruhjaya Sumpah

Now, under cross-examination, in regard to the two letters, he said that after he had signed them the said Dato took it back and he did not see whether those two letters were dated or not. In regard to Wilson Teoh, he said that he employed him so that he could get back his money. Wilson Teoh told him that he could either get back the money from the appellant or from the said Dato. Mr. Khue Jau Horng proceeded to testify as follows (see p. 88 of the appeal record):

6. They came after office hours, cannot remember the day.

7. *[Question : by appointment?]* – I cannot remember.

8. *[Question : what was the purpose of the visit?]* – I cannot remember.

9. *[Question : how did the subject of the preparation of the letter arise?]* – He came in and we chit-chatted. I had previously chased him for the money as there ws (sic)(was) nothing done. I had paid RM35,000 to them.

10. *[Question : how long before?]* – a few months before.

11. *[Question : when work was not done, what did you do?]* – I instructed my secretary to call. My secretary also called Mr. Hoo Lin Coln. She is Ms Liaw.

12. My secretary called. Dato Manjit said he got nothing to do with this matter. My secretary called Mr. Lin Coln. Quite difficult to get him on the hand-phone. When he saw my office number, he did not answer. Both Dato Manjit and Lin Coln pushed it around.

13. *[Question : When was Wilson Teoh engaged?]* – I cannot remember.

14. *[Question : before or after Dato Manjit and Mr. Lam came?]* – After. Cannot remember how long after.

15. *[Question : if Wilson Teoh wants to claim money back, why did he withdraw complaint?]* – I don't know.

It was quite natural for Mr. Khue Jau Horng to trust his secretary because she has worked for him for 20 years. Thus, when his secretary told him that the said Dato had given the green light to release the money to the appellant he believed her. Now, according to Mr. Khue Jau Horng the said Dato came to see him to inquire about the sum of RM35,000 and

the said Dato kept on saying that he did not receive the money. The testimony of Mr. Khue Jau Horng continues as follows (see p. 88 of the appeal record):

16. My secretary said Dato Manjit said we can release money to Lin Coln. My secretary has worked for me for 20 years. I trusted her.

17. Dato Manjit came to inquire about the RM35,000.

18. *[Question : is it because he did not receive the RM35,000?]* – Dato Manjit informed me Lin Coln no longer worked for him. I asked Dato Manjit as he is the boss. I had informed him about the release of the money. Dato Manit (sic) (Manjit) then said if you want the money, sign letter.

19. Dato Manjit kept on saying he did not receive the money.

20. Then he asked me to sign the letter.

21. Then I hired Wilson to resolve it.

22. Wilson went to see Lin Coln in his office. I don't know how he located him.

[At this point, the witness said he was very tired and could not continue. The hearing was adjourned to March 4, 2005 at 3 pm].

It must be borne in mind that there was no cross-examination of Mr. Khue Jau Horng in regard to his statutory declaration.

4.13 The 4th day of the hearing before the DC was on 30 March 2005 and on that day Miss Liaw Siew Fuai (RW4), the secretary of Mr. Khue Jau Horng, gave evidence. She corroborated the testimony of Mr. Khue Jau Horng and there was no rebuttal evidence from the said Dato. Apart from being the secretary, she also doubled up as the accounts clerk in SKB. According to her, she has been working for Mr. Khue Jau Horng since May 1986 and at the time when she gave evidence she was still working with SKB. She was shown a payment voucher dated 29 March 2000 and she testified to the following effect (see p. 90 of the appeal record):

6. The Chinese handwriting here is Mr. Khue's, including the words at "authorised by". The words "clearing date 31/3/2000" were written by me.

7. This was addressed to Mr. Hoo Lin Coln.

8. Before writing this voucher, my boss asked me to phone Dato Manjit.

9. I called him to tell him that Mr. Hoo Lin Coln has come to collect money and I asked him if we can pay. Dato Manjit said we can release money, can issue cheque.

Another payment voucher was shown to her, and this was what she had to say (see p. 90 of the appeal record):

10. This is a payment voucher, written by my boss, for "cash". I recognise his writing. I did not see him write.

11. My boss told me that the purpose of the voucher was to pay Hoo for the trade mark case.

12. Before the payment I made a phone call to Dato Manjit.

13. I told Dato Manjit that I want to make payment to Hoo Lin Coln. I also told him this is the second payment. He said OK.

Finally, a third payment voucher was shown to her and she was quick to explain what had transpired (see p. 90 of the appeal record):

14 This is also a payment voucher, also to Hoo Lin Coln, also for the trade mark case.

15. Yes, I made a phone call to Dato Manjit. I told him that I want to make payment to Hoo Lin Coln.

16. I told him that this is the 3rd payment and I am going to issue a cheque to him.

17. Dato Manjit said can make payment.

Thus, it can readily be concluded, bearing in mind that there was no rebuttal evidence from the said Dato, that the release of three cheques totalling RM35,000 to the appellant received the approval of the said Dato when Miss Liaw Siew Fuai telephoned him. Just like Mr. Khue Jau Horng who believed in his own secretary of 20 years' standing, there is no reason why this court, looking at the cold print, should

not believe her, bearing in mind that she was an independent witness. Miss Liaw Siew Fuai continued further in her evidence. She testified that the said Dato and Mr. Lam Sam Kit came to her office to meet Mr. Khue Jau Horng. She testified that the said Dato drafted two letters. This must have been the letter dated 21 October 2000 as seen at p. 20 to p. 21 of the appeal record and another letter dated 24 October 2000 as seen at p. 22 to p. 23 of the appeal record. And both these two letters have been alluded to in the early part of this judgment. Her testimony went like this (see p. 90 to p. 91 of the appeal record):

> 18. On or around October 21, 2000, there was a meeting at my office. I saw Dato Manjit and someone else I did not know. I was later informed that this was Mr. Lam Sam Kit.
>
> 19. I think the time was about 5 or 6 pm.
>
> 20. I can remember page 8 more. This letter was to inform we had made payment to Mr. Hoo Lin Coln. I typed this letter.
>
> 21. I typed it on the same day when Dato Manjit and Mr. Lam came.
>
> 22. I did not type the letter on page 6. My boss's younger sister typed this.
>
> 23. When Dato Manjit came that evening, he drafted 2 letters. Wanted to bring 2 letters back immediately. My boss's younger sister typed one letter and I typed the other.
>
> 24. I typed this letter but I did not date it.
>
> 25. Both letters were typed on the same day – October 21, 2000.

Under cross-examination, she confirmed that the said Dato and Mr. Lam Sam Kit went to visit her boss (Mr. Khue Jau Horng) on 21 October 2000. She too confirmed that she had telephoned the said Dato in regard to the three payment vouchers before the three cheques were released to the appellant. She testified that she saw the said Dato write the two letters. Of crucial importance, she revealed that the

appellant had obtained the trademark for SKB for RM1,000 odd as filing and disbursement fees. Her testimony was like this (see p. 93 of the appeal record):

38. Yes, we got the trade mark – Mr. Hoo got it.

39. *[Question: was there any additional fee?]* – No, only the filing fee.

40. *[Question: how much?]* – RM1,000 plus. Only filing fee and disbursements.

She was extensively cross-examined and I must say, looking at the cold print, that she performed rather well. The exchanges went like this (see p. 93 to p. 94 of the appeal record):

41. *[Question : did you know RM35,000 was asked for by Hoo?]* – No.

42. On all 3 occasions I said to Dato, Mr. Hoo is here to collect money.

43. Dato wrote page 8.

44. With reference to page 22, I was the one who wrote this, and I also signed at "checked by".

45. Pages 23 and 24, my boss wrote the vouchers and I wrote "clearing date". When my boss writes the voucher, I do not need to write at "checked by".

46. Page 6 – I did not type this letter. This was typed by my boss's sister.

[The Committee asked – how can you know she typed this letter and not any other? The witness did not answer.]

47. *[Question : normally, who prepares vouchers?]* – me and another girl. But she was in charge of smaller sums. I am in charge of above RM300,000.

48. *[Question : does Mr. Khue prepare?]* – Quite often.

49. *[Question: in what circumstances?]* – Hard to say. When he is free. When he wants to make payment.

50. *[Question: is Dato Manjit your boss's friend?]* – They are business acquaintenances. (sic) (acquaintances).

51. *[Question : why did Mr. Khue not call Dato? He does not keep his contact number?]* – I don't know. I just told him I have asked and given green light.

52. My boss asked me to call. I don't know why he didn't call himself.

53. *[Question: do you normally speak to Dato Manjit about lawyers?]* – I am sure I spoke to Dato Manjit.

54. *[Question: have you issued cheques to Hoo other than these 3?]* – No.

55. *[Question: Other cheques to Dato were cash cheques?]* – These 3 were the only cash cheques. I issue in accordance to bill – normally to the firm.

56. *[Question: do you remember what time they came?]* after 6 pm. After the girl in front of me left.

Finally, towards the last portion of her testimony, the following passages appeared (see p. 94 of the appeal record):

No further questions.

No further witnesses for Respondent. Mr. Ringo Low said he wished to recall Dato Manjit as he wanted him to rebut the evidence given by Ms Liaw. Mr. Harjinder said he can accept that Dato Manjit would deny what Ms Liaw said.

Written submissions to be submitted by 5 pm April 8, 2005.

The concession was certainly fatal. It cannot be taken lightly. A concession of this nature does not absolve the first respondent from not calling the said Dato in order to rebut the allegations of Miss Liaw Siew Fuai (*Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469 FC).

Interim Stay

[5] On 30 September 2005, sitting alone, I granted an interim stay pending the disposal of the appeal before a panel of three judges of the High Court pursuant to s. 103E(2) of the LPA (*Nadarajan s/o Verayan v. Hong Tuan Teck (No 1)* [2005] 6 AMR 228).

Analysis

[6] I have taken an arduous route in narrating the pertinent facts of the present appeal. No stone was left unturned. It was an interesting exercise. It showed that in the face of the overwhelming sworn evidence of Mr. Khue Jau Horng and his secretary, the DC should have found as a fact that the complainant had not discharged the standard of proof required to prove the complaint. In fact, the appellant had raised a reasonable doubt. Sad to say, against all this overwhelming evidence the said Dato thought it fit not to give any rebuttal evidence challenging the evidence of Miss Liaw Siew Fuai. And when Mr. Khue Jau Horng gave evidence, he was not even cross-examined on his statutory declaration. That failure meant that the statutory declaration of Mr. Khue Jau Horng was accepted, lock stock and barrel, as the gospel truth.

[7] The DB did not dispute the requisite standard of proof and that would be the criminal standard of proof, that is, proof beyond reasonable doubt. The law books are replete with authorities on this point. The case of *Au Kong Weng v. Bar Committee, Pahang* [1980] 2 MLJ 89, FC, is a classic example. This would be followed by the case of *Keith Sellar v. Lee Kwang, Tennakoon v. Lee Kwang* [1980] 2 MLJ 191, FC where Hashim Yeop A. Sani J, delivering the judgment of the Federal Court aptly said at p. 194 of the report:

> First, what is the standard of proof required in such a proceeding? Very recently, this court in *Au Kong Weng v. The Bar Committee, State of Pahang* [1980] 2 MLJ 89 dealt with the same question and accepted the standard set by *Bhandari*'s case [1956] 3 All ER 742. Lord Tucker in that case approved the required standard established by the Court of Appeal in that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for. The Court of Appeal also expressed the view that any body of professional men sitting in judgment on a colleague should not be content to condemn on a mere balance of probabilities.
>
> The standard of proof required in a proceeding of this type is proof beyond reasonable doubt. In the judgment of this court in *Au Kong Weng*'s case, the Chief Justice said:

> It is a question for the committee to decide, first, whether the facts alleged in the charge had been proved beyond reasonable doubt and secondly whether the appellant in relation to those facts, was guilty of such conduct. The absence in the Committee's determination of any mention of the standard of proof does not justify an inference that it had failed to have regard to it.

In *Au Kong Weng*'s case it was also clearly held that there were no closed categories of professional misconduct.

[8] This is further bolstered by the case of *Bhandari v. Advocates Committee* [1956] 3 All ER 742 where the Privy Council sets out the following salient principle of law (see p. 742):

> In every allegation of professional misconduct involving an element of deceit or moral turpitude, it is the duty of the professional domestic tribunal investigating the allegations to apply a high standard of proof and not to condemn on a mere balance of probabilities.

[9] The latest decision from the Privy Council in the case of *Campbell v. Hamlet* [2005] 3 All ER 1116 retains the criminal standard of proof as being the correct standard to be applied in all disciplinary proceedings concerning the legal profession.

[10] That the criminal standard of proof is proof beyond reasonable doubt and not on a mere balance of probabilities is not disputed by the parties. But, both the respondents say, based on the totality of the evidence before the DC, that the criminal standard of proof has been fulfilled. The appellant holds an opposite view and submits that the criminal standard of proof has not been discharged by the first respondent.

[11] It is submitted that the second respondent's role, as well as the role of the DC, is entirely quasi-judicial. *Black's Law Dictionary*, 7th edn with Bryan A. Garner as the editorial chief at p. 1258 defines the phrase "quasi-judicial" as follows:

> quasi-judicial, adj. Of, relating to, or involving an executive or administrative official's adjudicative acts.? Quasi-judical acts, which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens. They are subject to review by courts.

> Quasi-judicial is a term that is ... not easily definable. In the United States, the phrase often covers judicial decisions taken by an administrative agency – the test is the nature of the tribunal rather than what it is doing. In England quasi-judicial belongs to the administrative category and is used to cover situations where the administrator is bound by the law to observe certain forms and possibly hold a public hearing but where he is a free agent in reaching the final decision. If the rules are broken, the determination may be set aside, but it is not sufficient to show that the administration is biased in favour of a certain policy, or that the evidence points to a different conclusion.' George Whitecross Paton, A *Textbook of Jurisprudence* 336 (G.W. Paton & David P. Derham eds. 4th ed. 1972).

At the same page, it also defines the phrase "quasi-judicial act" in this manner:

> quasi-judicial act. 1. A judicial act performed by an official who is not a judge. 2. An act performed by a judge who is not acting entirely in a judicial capacity. See JUDICIAL ACT.

As to the personalities who sit on the DC, reference should be made to s. 103B of the LPA. That section enacts as follows:

103B Disciplinary Committee

(1) The Disciplinary Board shall appoint a Disciplinary Committee to consider, in cases where an Investigating Tribunal has been appointed, the report of the Investigating Tribunal, or to investigate and make recommendations to the Disciplinary Board in respect of cases under section 103A.

(2) A Disciplinary Committee shall consist of three members of whom shall be:

(a) two advocates and solicitors; and

(b) one lay person,

appointed from the Disciplinary Committee Panel.

(3) The Disciplinary Board shall appoint a member from paragraph (a) of subsection (2) to be the chairman of the Disciplinary Committee.

A And at p. 72 of the appeal record, the names of the three members who formed the DC are set out therein: two of whom are advocates and solicitors, while the third is a lay person who happens to be a medical practitioner. Here, the DC had to hear and investigate the complaint against the appellant referred to it B by the DB and record its findings in relation to the facts of the case and according to those facts determine and make any one of the following recommendations to the DB (see s. 103C(1)(a), (b) and (c) of the LPA):

C **103C Findings of Disciplinary Committee**

(1) After hearing and investigating any matter referred to it a Disciplinary Committee shall record its findings in relation to the facts of the case and according to those facts shall determine and make any one of the following recommendations D to the Disciplinary Board:

(a) that no cause of sufficient gravity for disciplinary action exists;

(b) that while no cause of sufficient gravity for disciplinary E action exists the advocate and solicitor should be reprimanded; or

(c) that there is sufficient merit in the complaint and that the advocate and solicitor should be subject to one of the following disciplinary actions:

F

(i) imposition of a fine upon the advocate and solicitor for such sum as the Disciplinary Committee deems just;

(ii) suspension of the advocate and solicitor concerned from practice for such period as the Disciplinary G Committee deems appropriate in the circumstances; or

(iii) striking off the Roll of the advocate and solicitor concerned.

As alluded to earlier, the DC recommended that the appellant be H struck off the Roll and the DB concurred. In submitting that the roles of the DC and the DB are quasi-judicial, the first respondent is saying that there is no need for the proceedings to be conducted according to the strict adversarial procedure as practised in a criminal court in order to satisfy the rules of natural I justice (*Kanawagi a/l Seperumaniam v. Dato' Abdul Hamid bin Mohamad* [2004] 5 MLJ 495; *Jerald Allen Gomez v. Shencourt Sdn Bhd; Majlis Peguam (Intervenor)* [2006] 1 CLJ 88, [2006] 2 AMR

449; and *Ketua Pengarah Kastam v. Ho Kwan Seng* [1977] 2 MLJ 152, FC). Fairness is the name of the game, so says the first respondent. Emphasis was placed on the passage that appears in the judgment of Raja Azlan Shah FJ (as His Majesty then was) in *Ketua Pengarah Kastam v. Ho Kwan Seng (supra)* at 154 of the report. That passage reads as follows:

> In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. That is because a formal hearing is too slow, too technical and too costly. Lord Shaw's caveat on administrative adjudication that 'judicial methods may ... be entirely unsuitable, and produce delays, expenses, and public and private injury' is too well-known to be side-stepped: see *Local Government Board v. Arlidge* [1915] AC 120, 138. In the last analysis, it depends on the subject-matter. The great need is to deal efficiently and fairly, rather than to preserve all the accoutrements of the courtroom; the considerations of basic fairness are paramount.

The respondent in *Ketua Pengarah Kastam v. Ho Kwan Seng (supra)* was the sole proprietor of the Oriental Forwarding Agency at Klang – a businessman and not an advocate and solicitor. Here, we are dealing with the livelihood of an advocate and solicitor – a legal practitioner. They are worlds apart. They are not of the same breed. You do not need a law degree to be a businessman. If you are running a business, whether it is a corner unit branded furniture shop or a pizza outlet, there are three key indicators for success: employee satisfaction, customer satisfaction and cash flow. But you certainly require a legal qualification to become an advocate and solicitor, and your professionalism as a lawyer is the key indicator to your success. An advocate and solicitor too owes a duty to the court and a duty to the client. Thus, it can be said that, unlike a businessman, an advocate and solicitor has an overriding duty to the court and must act with some measure of independence in the interests of justice. An advocate and solicitor must assist the court and must not deceive or knowingly or recklessly mislead the court. It is a duty recognised at common law as demonstrated in *Rondel v. Worsley* [1969] 1 AC 191 at 227, [1967] 3 All ER 993 at 998, HL; *Abse and Others v. Smith and*

Another [1986] QB 536 at 546, [1986] 1 All ER 350 at 354, CA, *Beevis v. Dawson And Others* [1957] 1 QB 195 at 201, [1956] 3 All ER 837 at 839, CA; *Arthur JS Hall & Co (a firm) v. Simons, Barratt v. Ansell and others (trading as Woolf Seddon (a firm)), Harris v. Scholfield Roberts & Hill (a firm) and Another* [2002] 1 AC 615 at 686, [2000] 3 All ER 673 at 687, HL; *Geveran Trading Co Ltd v. Skjevesland* [2002] EWCA Civ 1567, [2003] 1 All ER 1; *Saif Ali v. Sydney Mitchell & Co (a firm) and others, P (third party)* [1980] AC 198 at 219, [1978] 3 All ER 1033 at 1042, HL; *Vernon v. Bosley (No: 2)* [1999] QB 18, [1997] 1 All ER 614, CA; *Meek v. Fleming* [1961] 2 QB 366, [1961] 3 All ER 148, CA; *Tombling v Universal Bulb Co Ltd* [1951] WN 247, [1951] 2 TLR 289, CA; *Poole v. Whitcombe* [1862] 12 CBNS 770; *Praed v. Graham* [1889] 24 QBD 53 at 55, CA; and *Reekie v. M'Kinven* [1921] SC 733. In discharging his professional duties, an advocate and solicitor must always be courteous and must also act promptly, conscientiously, diligently and with a reasonable measure of competence. He must preserve the confidentiality of his client's affairs. And this duty of confidentiality continues even after the relationship of counsel and client has ceased. It is a matter of law that an advocate and solicitor must adhere strictly to this duty of confidentiality (*Carter v. Palmer* [1839] 1 Dr & Wal 722, affirmed *vide* [1841] 8 Cl & Fin 657, HL; and *R v. Walker* [1668] *Tremaine's Pleas of the Crown* 261, 2 Hawk PC II c 22s 30). It is for these reasons that the courts will grant an injunction to prevent an advocate and solicitor from disclosing client's secrets or to restrain the said advocate and solicitor from acting if he has in his possession relevant confidential information (*Prince Jefri Bolkiah v. KPMG (a firm)* [1999] 2 AC 222, [1999] 1 All ER 517, HL). These are some of the duties of an advocate and solicitor and many more are found in the LPA and the rules made thereunder as well as in the law journals, be they local or foreign. So, for an advocate and solicitor, the worst punishment is to be struck off the Roll. Striking off the Roll is a serious punishment. It demands proof beyond reasonable doubt to do so. A standard of proof as in criminal cases is required. Lord Brown of Eaton-Under-Heywood, delivering the judgment of the Privy Council, in *Campbell v. Hamlet (supra)* aptly said at p. 1122 of the report:

> [20] Perhaps more directly in point, however, is the decision of the Divisional Court in *Re A Solicitor* [1992] 4 All ER 335, [1993] QB 69, concerning the standard of proof to be applied by the Disciplinary Tribunal of the Law Society. Lord Lane CJ, giving the judgment of the court, referred to the Privy Council's opinion in Bhandari's case and continued:

> It seems to us, if we may respectfully say so, that it is not altogether helpful if the burden of proof is left somewhere undefined between the criminal and the civil standards. We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof, that is to say proof to the point where they feel sure that the charges are proved or, to put it another way, proof beyond reasonable doubt. This would seem to accord with decisions in several of the provinces of Canada. (See [1992] 2 All ER 335 at 344, [1993] QB 69 at 81.)

[21] A little later in the court's judgment Lord Lane referred to the provision in the Bar's Code of Conduct requiring the tribunal to apply the criminal standard of proof and observed ([1992 2 All ER 335 at 344, [1993] QB 69 at 82) 'it would be anomalous if the two branches of the profession were to apply different standards in their disciplinary proceedings'. This last observation, of course, clearly warranted the Law Society Disciplinary Committee henceforth applying the criminal standard in all cases rather than merely in those, earlier referred to, 'where what is alleged is tantamount to a criminal offence'.

[22] Their Lordships would add that, even had they concluded that the criminal standard should apply only in disciplinary cases where what is alleged is tantamount to a criminal offence, that, at least arguably, would include the present case. This was certainly no mere contractual dispute. The appellant accordingly makes good this first stage of his argument.

In this connection, r. 23 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994 is applicable. That rule states as follows:

23 Right of cross-examination

At any hearing before the Disciplinary Committee:

(a) the advocate and solicitor concerned may cross-examine the complainant and his witnesses, if any, in relation to the complaint;

(b) the complainant may cross-examine the advocate and solicitor concerned where he gives evidence, and his witnesses, if any.

It simply means that the complainant has to give evidence and the appellant has the right to cross-examine the complainant and his witnesses in relation to the complaint. The complainant too may cross-examine the appellant and the appellant's witnesses. Here, the complainant was Mr. Wong Weng Woh, the first respondent, but he did not give his evidence and the DC did not consider this as a factor to be taken into account in favour of the appellant. Cross-examination is the questioning of a witness immediately after his examination-in-chief. Cross-examination is not confined to matters proved in examination-in-chief but it may relate to any fact in issue or anything that is relevant to a fact in issue. But this does not mean that inadmissible evidence can become admissible by just putting it to a witness in cross-examination. The ordinary rules relating to the inadmissibility of certain types of evidence would operate in order to prevent such evidence from being elicited in cross-examination as well as in examination-in-chief (*R v. Treacy* [1944] 2 All ER 229). The bottom line is this. The appellant was deprived of cross-examining Mr. Wong Weng Woh because he did not give his evidence even though he was the complainant in this disciplinary proceeding. If Mr. Wong Weng Woh had given evidence, the appellant would have been entitled to cross-examine him in order to elicit evidence which supported the appellant's version of the facts in issue and at the same time to cast doubt upon Mr. Wong Weng Woh's evidence. Since Mr. Wong Weng Woh did not give evidence, the appellant was also deprived of cross-examining him in regard to his statutory declaration.

[13] The DC misdirected itself by way of a non-direction on the standard and the burden of proof required when it heard and investigated the complaint against the appellant under s. 103C of the LPA. Without calling the complainant in the person of Mr. Wong Weng Woh and offering him for cross-examination, the DC directed the appellant to begin the case by insisting that the appellant give his evidence first. This is indeed a grave procedural error and is clear evidence of the misdirection of the DC on the question of the burden of proof. It is obvious that the appellant was deprived and prejudiced by this procedural error because he lost the inherent right of rebuttal. Only after the appellant and his sister had given evidence did the complainant's witnesses take the stand and give evidence. That by itself reduced the rebuttal value of the appellant's evidence. In my judgment, by this total reversal of procedure adopted by the DC, the DC had misdirected itself

on the standard and the burden of proof required in hearing and investigating the matter referred to it by the DB under s. 102(2)(b) of the LPA.

[14] The DC misdirected itself on the assessment of evidence when it made a finding not to believe Miss Liaw Siew Fuai when she testified that the said Dato knew about the monies that were paid to the appellant because she had personally telephoned the said Dato on the instructions of her boss (Mr. Khue Jau Horng) on three occasions before she issued the three cheques to the appellant purely on the following ground: that the said Dato had denied receiving the monies.

[15] But it must be borne in mind and when seen in its right context and perspective that the said Dato had every reason to deny this because that kind of denial was self-serving and was activated by a fervent desire for self-preservation. Furthermore, the DC had failed to give sufficient weight to the evidence of Miss Liaw Siew Fuai bearing in mind that she was an independent witness who had no interest in this matter at all. It is ideal, at this stage, to refer to two salient authorities, both of which were the decisions of Raja Azlan Shah J (as His Majesty then was).

[16] Firstly, it would be the case of *Liow Siow Long v. Public Prosecutor* [1970] 1 MLJ 40, 41, where His Majesty said:

> It is difficult to accept that suggestion that if a witness is shown to be a relation of the deceased his evidence is tainted. Testimony of close relations is not tainted if it is otherwise reliable in the sense that the witnesses are competent witnesses who were at the scene of the occurrence and could have seen what had happened. But if it is proved that they are not entirely disinterested witnesses, eg, they are either partisans of the complainant or are in any way inimical to the accused, then their testimony is tainted and requires corroboration if to be acted upon.

Here, Miss Liaw Siew Fuai is not a relative of the appellant. She was, at the material time, the secretary of Mr. Khue Jau Horng of twenty years standing. But the speech of His Majesty is still relevant in assessing the weight to be attached to the testimony of Miss Liaw Siew Fuai.

[17] Secondly, reference should be made to the case of *Lim Boon San v. Public Prosecutor* [1968] 2 MLJ 45, where the headnote states:

A (3) where a witness may be regarded as having a purpose of his own to serve, the judge must direct his mind on the danger of convicting on the uncorroborated evidence of such witness; but if there is clear and convincing evidence to such an extent that an appellate court is satisfied that no miscarriage of justice has arisen by reason of the omission of direction, the court will not interfere.

B

Here, Miss Liaw Siew Fuai had no ulterior motive of her own. She was an independent witness worthy of credit. Again, the DC had also misdirected itself by way of a non-direction in that both Mr. Khue Jau Horng and Miss Liaw Siew Fuai should have been C called as witnesses by the complainant, the first respondent, and not by the appellant. It must be emphasised that when the IT recommended that no action ought to be taken against the appellant and had, in fact, dismissed the complaint, the IT had arrived at its decision without hearing the evidence of both Mr. D Khue Jau Horng and Miss Liaw Siew Fuai. A *fortiori*, the DC should have dismissed the complaint with the benefit of the evidence of both Mr. Khue Jau Horng and Miss Liaw Siew Fuai whom the appellant had produced before the DC. I agree with the submission of the learned counsel for the appellant that there E is no reason to doubt the evidence of these two personalities – referring to Mr. Khue Jau Horng and Miss Liaw Siew Fuai. They were totally independent and uninterested witnesses and had nothing to gain from the outcome of the whole matter and these witnesses should, in the first place, be brought before the DC by F the complainant and not by the appellant, as was done, and that clearly illustrates the forthrightness of the appellant.

[18] The DC failed to make the complainant in the person of Mr. Wong Weng Woh available for cross-examination and this is in G direct contravention of r. 23 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994. This rule categorically provides for the right of cross-examination. Here, the complainant was not called and so the appellant was deprived of the golden opportunity through cross-H examination:

(1) to weaken, qualify, or destroy the case for the first respondent; and

(2) to establish the appellant's case by means of and dependent I on the first respondent's weaknesses.

The appellant too was deprived of the opportunity to impeach the credibility, accuracy and the general value of the evidence of the complainant, in examination-in-chief, if he was called to testify by the first respondent. In this case, it will be recalled that the first respondent was the complainant. The appellant was also prevented from detecting and exposing discrepancies in the evidence of the complainant, if he was called, and to elicit suppressed facts, for instance, as to why the said Dato and not the complainant who was called to testify, which would certainly support the case for the appellant. In short, cross-examination is the best tool, devised by the law, for the discovery of the truth.

[19] The DC was unduly concerned about the failure of the appellant to produce his evidence and the DC even had doubts about the evidence produced by the appellant. The DC had misdirected itself when it failed to address the issue of whether the complainant in the person of the first respondent had discharged his burden of proof and had proved his case.

[20] The reversal of procedure as adopted by the DC, and which was alluded to earlier, carried with it dire consequences. It was a procedure that was virtually asking the appellant to prove his innocence. It was most unfair on the part of the DC to reverse the procedure and place an undue burden onto the appellant. In this regard, however, the learned counsel for the first respondent submitted that there was no set procedure prescribed by the LPA or the rules made thereunder and that there was fairness in the proceeding as conducted by the DC. He brought to the attention of this court Jerald Allen Gomez, which I have cited earlier. The learned counsel for the appellant, in response, submitted that the complainant must always begin first and that the procedure that should have been followed by the DC is as prescribed by r. 23 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994 which I have referred to earlier. Now, Jerald Allen Gomez is a judgment of the High Court sitting, like this court, pursuant to s. 103E(2) of the LPA. In that case, the facts were that at the commencement of the hearing of the proceeding before the DC, the complainant was absent, but his representative was present. The representative requested to the DC for an adjournment but the request was turned down. The DC proceeded with the hearing of the inquiry by directing the advocate and solicitor complained against to give his evidence first. When the hearing was adjourned to the

following day, the complainant was present and propounded the complaint against the said advocate and solicitor, and was cross-examined by the latter. On appeal to the High Court by the advocate and solicitor concerned, it was argued by the appellant there that the procedure adopted by the DC in reversing the process was irregular and unfair. This argument was rejected by the High Court. The High Court held that there was nothing irregular or unfair in the procedure adopted by the DC. With respect, in the present case, I take a different view for the reasons that I have already given. And I wish to add that I am in agreement with the learned counsel for the appellant that r. 23 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994 does not merely confer the right of cross-examination to the parties, it also prescribes the procedure of the proceeding for the DC to adopt, that is to say, the order of the cross-examination: who should testify and be cross-examined first. Upon a close scrutiny of that r. 23, as set out earlier in this judgment, one will note that the rule refers to the cross-examination of the complainant first: for the rule provides for the cross-examination of the complainant in para. (a) of the rule. And only thereafter, does the rule go on to provide for the cross-examination of the advocate and solicitor concerned: for the cross-examination of the advocate and solicitor concerned is provided for in para. (b) of the rule. The necessary implication is that the evidence of the complaint and the cross-examination of the complainant must precede the evidence and cross-examination of the advocate and solicitor concerned. To my mind, such an interpretation of r. 23 is in consonance with the principles of fair hearing. Perhaps, with all due respect, the High Court in Jerald Allen Gomez might have taken a similar view that this court takes had it took into account r. 23.

[21] To add insult to injury, the DC had made a serious error in its finding of fact when it based its "findings of misconduct by the appellant" purely premised on the fact that the work required of the appellant was not done in that the registration of SKB's trademark was not done. Towards this end, the DC failed to take into consideration the evidence of Miss Liaw Siew Fuai which showed beyond doubt that the trademark was eventually obtained by the appellant. And this piece of evidence went unchallenged.

[22] At p. 234 of the appeal record at para. 19, this was the conclusion of the DC after hearing the evidence:

> Having assessed the documents in the Record of Complaint and the evidence adduced by both parties, the Committee is of the view that the Respondent was guilty of misconduct within the meaning of section 94 of the Legal Profession Act 1976 in that he had acted dishonestly and fraudulently in the discharge of his professional duties in that he had solicited a client of the firm to pay him a sum of money, without the knowledge of the firm, had not done the work requested by the client and kept the sum of money for himself.

Three observations must be made. In regard to the fact that the appellant had taken the cash cheques amounting to RM35,000 it was taken with the knowledge of the said Dato bearing in mind the evidence of Miss Liaw Siew Fuai who had earlier telephoned the said Dato before releasing the cash cheques to the appellant for onward transmission to the said Dato. In regard to the alleged non-registration of SKB's trademark, the evidence of Miss Liaw Siew Fuai showed otherwise; that in fact, work was done by the appellant. In regard to the allegation that the sum of RM35,000 was kept by the appellant we have the following conflicting evidence:

(1) the appellant testified that he had given the sum of RM35,000 to the said Dato; and

(2) the said Dato denied receiving the sum of money and he ventured to explain that if the money was taken a receipt would be issued and the client will have to sign the appointment of solicitors and a file would be opened.

In its findings, the DC said (see p. 233 at para. 16):

> 16. The Committee considered the evidence of Ms Liaw that she had spoken to Dato Manjit over the telephone that it was in order for the cheques to be released to the Respondent. However, the Committee doubted that this was true. Dato Manjit Singh had denied all knowledge of the sum of RM35,000 being paid.

but the DC failed to advance the reasons as to why the DC had doubted the testimony of Miss Liaw Siew Fuai, which was tantamount to accepting the said Dato's denial as true. In these circumstances, the benefit of the doubt should have been given to the appellant.

[23] So it can readily be surmised that the DC had misdirected itself when it failed to set out the reasons as to why Mr. Khue Jau Horng and Miss Liaw Siew Fuai ought not to be believed. The DC had failed to take into account and consider that their evidence:

(1) was the evidence of two independent and non-self serving witnesses who had corroborated the evidence of the appellant;

(2) had created serious doubts on the versions of the facts as presented by the first respondent through the said Dato and Mr. Lam Sam Kit;

(3) was consistent with the innocence of the appellant; and

(4) totally destroyed and demolished the first respondent's complaint.

[24] Shaik Daud bin Hj Md Ismail JCA, speaking for the Federal Court, had this to say in *Ganapathy a/l Rengasamy v. PP* [1998] 2 CLJ 1 (see p. 6 to p. 7):

> First and foremost we would like, with respect, to mention here that the grounds of judgment of the learned Judge are far from satisfactory in that they do not convey a "speaking" judgment although the importance of this has been stressed in a number of decided cases. (See, for example, *Balasingam v. PP* [1959] MLJ 193 per Ismail Khan J (as he then was) and *Murugiah v. PP* [1941] MLJ 17 per Horne J). They consist substantially of reproduction of prosecution witnesses' testimonies in the form of questions and answers. The learned Judge failed to analyse or assess these testimonies. He merely set them out and presumably accepted them without question. He has not set out the defence of the appellant with a view of assessing it, nor has he tested the defence by comparing it with the evidence-adduced by the prosecution.
>
> It needs to be remembered that however weak a defence may be, trial judges being judges of both fact and law, should not just brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence. Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, which if consistent with innocence, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth. On the issue of the court's duty to consider the defence, the age old decision in *Mat*

v. PP [1963] MLJ 263 is still good law today as it was then. This was followed by the Supreme Court in *Mohamad Radhi b Yaakob v. PP* [1991] 3 MLJ 169.

[25] Ismail Khan J (who later rose to be the Chief Judge of Borneo) in *Balasingham v. Public Prosecutor* [1959] 25 MLJ 193 aptly said at p. 194 of the report:

> The trial Court is under a statutory obligation under section 308 of the Criminal Procedure Code to transmit to the Appellate Court the grounds of decision which convey to my mind a reasoned judgment on the facts and the law not merely the conclusion arrived at. The advantage of a 'speaking' judgment needs no emphasis.In fact in *Murugiah v. Public Prosecutor* [1941] MLJ 17 and *Public Prosecutor v. Low Toh Seng* [1941] MLJ 1 both Horne J and Terrel Ag. CJ felt that the absence of reasons indicates the possibility that such vital consideration as the weight of evidence and the possibilities of the case may not have influenced the mental process of the trial Judge in arriving at the ultimate finding. After all there is no legal presumption that an interested witness should not be believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances.

With respect, the written decision of the DC leaves much to be desired. It falls below the standards as stipulated by these two learned judges.

[26] In my judgment, the appellant had adduced overwhelming evidence in his favour against the unsubstantiated allegation by the first respondent. The DC gave no reasons for disbelieving or doubting the testimonies of Mr. Khue Jau Horng, Miss Liaw Siew Fuai and the appellant himself. With respect, the written decision of the DC was not a reasoned judgment. In *Dato' Mokhtar bin Hashim & Anor. v. Public Prosecutor* [1983] 2 MLJ 232, at p. 269, Hashim Yeop A. Sani J (who later rose to be the Chief Judge of Malaya) succinctly said and this would surely apply to the case at hand:

> I admit there is a lot of suspicion cast on Nordin Johan and Aziz Abdullah. I will not conjecture how they will live out this suspicion. But in our system of administration of justice suspicion, however strong, cannot be a substitute for proof by admissible evidence.

[27] It cannot be denied that the appellant had adduced overwhelming evidence against the scarcity of admissible evidence advanced by the complainant. It must be emphasised that both Mr. Lam Sam Kit and the said Dato were not present when the cheques were handed to the appellant at the office of SKB and their evidence on this point was entirely hearsay. Independent witnesses in the persons of Mr. Khue Jau Horng and Miss Liaw Siew Fuai knew about the episodes pertaining to the handing over of the cheques at SKB's office to the appellant. The DC did not make any finding that the complaint was proved beyond reasonable doubt and that the appellant has not raised a reasonable doubt. Yet the DC doubted the testimony of the appellant without taking into consideration the testimonies of Miss Hoo Lina, Mr. Khue Jau Horng and Miss Liaw Siew Fuai.

[28] The DC also failed to take into consideration the relevance of the original complaint which was dated 24 October 2000 and which was alluded to in the early part of this judgment. Now, the original complaint and the letter dated 21 October 2000 were both prepared and drafted under the instructions of the said Dato and when the truth was revealed the original complaint was withdrawn. This was corroborated by Mr. Khue Jau Horng who further testified that both the original complaint and the letter dated 21 October 2000 were written in the English language which he could not understand nor read. Mr. Khue Jau Horng further testified that:

(a) on 21 October 2000, the said Dato came to his office and prepared two letters on his company's letterhead (meaning on SKB's letterhead) and this was corroborated by Miss Liaw Siew Fuai who testified that both she and Mr. Khue Jau Horng were present at the material time;

(b) that the said Dato told him that the two letters were meant to "claim back his money";

(c) that he was not aware of the contents of the two letters;

(d) that the said Dato was aware of the payments made to the appellant as each time a payment was made he had directed his secretary Miss Liaw Siew Fuai to make a telephone call to the said Dato and Miss Liaw Siew Fuai herself confirmed this fact;

(e) that he employed Wilson Teoh to sort out the matter and thereafter he withdrew the original complaint dated 24 October 2000; and

(f) that the work contracted out to MSSMR was performed by the appellant as confirmed by the evidence of Miss Liaw Siew Fuai, yet the DC found otherwise.

[29] The DC failed to consider nor take into account the statutory declaration of Mr. Khue Jau Horng dated 17 January 2005 which was admitted as evidence. For reasons best known to itself the DC totally ignored Mr. Khue Jau Horng's statutory declaration in its written decision without assigning any reason whatsoever.

[30] Just because the DC doubted the appellant's version of the facts, that did not mean that the complaint had been made out against the appellant. In my judgment, the decision of the DC was flawed in that it went against the weight of the evidence adduced by the appellant. I reiterate that the DC completely ignored the evidence of both Mr. Khue Jau Horng and his secretary without assigning any reasons whatsoever. The DC failed to invoke an adverse inference against the first respondent for not offering himself as a witness to be cross-examined by the appellant. The presumption from withholding available evidence under s. 114(g) of the Evidence Act 1950 must be invoked against the first respondent. If a man wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted (*Williamson v. Rover Cycle Co.* [1901] 2 IR 619). This presumption is contained in this famous maxim: *omnia praesumuntur contra spoliatorem*. I am entitled to draw adverse inferences against the failure of the first respondent to give evidence and to the kind of evidence which the first respondent chose to withhold (*British Railways Board v. Herrington* [1972] AC 877 at 930).

[31] It is not denied that the complainant is the first respondent, a constituent of the law firm of MSSMR, and he is in fact the partner of the said law firm. But flowing from that, it is argued that the complaint comes from that law firm of MSSMR and so the complainant should be the same law firm of MSSMR and not the individual by the name of Mr. Wong Weng Woh who happens to be the first respondent. I beg to disagree. It is my

judgment that the complainant is not the law firm of MSSMR. It is Mr. Wong Weng Woh. Even the title of the present case bears the name of Mr. Wong Weng Woh as the first respondent. The law firm of MSSMR is not cited as a party in the present case. The fresh complaint dated 17 November 2000 as seen at p. 15 to p. 16 of the appeal record bears the name of Mr. Wong Weng Woh. It is in his personal capacity. This is so even though the fresh complaint was typed on the letterhead of the law firm of MSSMR. The signatory to the fresh complaint is none other than Mr. Wong Weng Woh himself.

[32] The facts of the present case, as demonstrated, weighed heavily in favour of the appellant. All said and done, the DC did not direct itself as to the standard of proof that was required to be applied in a disciplinary proceeding concerning the legal profession. In fact, the DC did not allude to it at all. That standard of proof, as I said earlier, is the criminal standard of proof and it is proof beyond reasonable doubt. I need to reproduce that part of the judgment of Lord Tucker in *Bhandari v. Advocates Committee (supra)* at p. 744 to p. 745 and it is as follows:

> With regard to the onus of proof, the Court of Appeal said:
>
> > We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men sitting in judgment on a colleague who would be content to condemn on a mere balance of probabilities.
> >
> > This seems to their Lordships an adequate description of the duty of a tribunal such as the Advocates Committee, and there is no reason to think that either the committee or the Supreme Court applied any lower standard of proof.

[33] Again, the speech of Lord Brown of *Eaton-Under-Heywood in Campbell v. Hamlet (supra)* at p. 1122 as reproduced earlier comes in handy. It emphasises on the criminal standard of proof which is proof beyond reasonable doubt.

[34] Here, the appellant succeeded in raising a reasonable doubt upon the evidence adduced. The case against the appellant must be proved beyond reasonable doubt. It was not done here. This court must therefore give the benefit of the doubt to the appellant.

[35] For all these varied reasons, it was our unanimous decision to allow the appellant's appeal with costs.

[36] I have shown this judgment in draft to my brother judges in the persons of Justice Dato T Selventhiranathan and Justice Dato Hj Mohd Hishamudin bin Hj Mohd Yunus and they have expressed their agreement with it.